UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CHRISTOPHER O'MEARA,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 02-220-P-H
	)	
NORMAN Y. MINETA, SECRETARY, UNITED STATES DEPARTMENT OF TRANSPORTATION,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pro se plaintiff, Christopher O'Meara, has filed suit against Norman Mineta, the United States Secretary of Transportation, alleging age and disability discrimination in his employment with the Federal Aviation Administration and unlawful retaliation for complaining of the same. The Secretary has moved for summary judgment on all claims. I **RECOMMEND** that the Court **GRANT** the motion.

THE RULE

By filing a motion for summary judgment against all of Mr. O'Meara's claims, the Secretary of Transportation is asserting two things: (1) that the facts of the case are not reasonably subject to dispute and (2) that the causes of action alleged in the complaint are not legally maintainable because of insufficient facts. Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a

judgment as a matter of law." Summary judgment is an accepted "means of determining whether a trial is actually required." Serapion v. Martinez, 119 F.3d 982, 987 (1st Cir. 1997). "Unless the party opposing a motion for summary judgment can identify a genuine issue as to a material fact, the motion may end the case." Triangle Trading Co. v. Robroy Indus., Inc., 200 F.3d 1, 2 (1st Cir. 1999). In order to identify a genuine issue of material fact, the party opposing a summary judgment motion must set forth "specific facts, in suitable evidentiary form" that would be sufficient to support a verdict in his or her favor at trial. Morris v. Gov't Dev't Bank of P.R., 27 F.3d 746, 748 (1st Cir. 1994).

This District has prescribed a specific local rule that governs the manner in which parties must identify genuine issues of material fact. See D. Me. Loc. R. 56. Adherence to Local Rule 56 is mandatory, even for pro se litigants. Covillion v. Alsop, 145 F. Supp. 2d 75, 77 (D. Me. 2001); Barstow v. Kennebec County Jail, 115 F. Supp. 2d 3, 4 (D. Me. 2000). Pursuant to Local Rule 56, a party moving for summary judgment must present the facts as to which he contends there is no genuine issue to be tried in a statement of material facts, which must be filed in a document separate from the motion and its—usually incorporated—memorandum. Each fact is to be set forth in a separate paragraph and must be supported by a citation to a specific page or paragraph of a supporting document in the record, such as a witness's deposition transcript. D. Me. Loc. R. 56(b), (e). If the party against whom summary judgment is asserted intends to challenge whether or not one or more of the moving party's statements is undisputed, he or she must file an opposing statement of material facts that tracks the movant's statements, indicate whether the statements are qualified or denied, set forth the evidence that rebuts the movant's statement and properly cite the pages or paragraphs in the record that support the qualification or denial. D. Me. Loc. R. 56(c). In addition, when the movant's statement ignores the existence of

facts that are material to those legal questions for which the non-movant bears the burden of proof, the party against whom the summary judgment motion is asserted must set forth such facts in a separate, titled section of additional facts (i.e., in the same document), which are typically set forth in paragraphs that are numbered consecutively to the movant's original paragraphs. Id. Finally, the movant may submit a reply statement of material facts, but only if a statement of additional material facts has been made by the party against whom summary judgment is asserted. The reply must be limited to admitting, qualifying or denying the statements set forth in the opponent's additional statements of material facts. D. Me. Loc. R. 56(d). In this manner, the parties should be able to present to the Court a picture of the evidence that would be presented and admitted during trial, so that the Court might determine whether there is a need for a fact finder, such as a jury, to evaluate conflicting evidence and resolve factual issues in favor of one party or the other. Triangle Trading Co., 200 F.3d at 2. Where it appears that there is no factual dispute for a fact finder to resolve or that the factual disputes are not material to the resolution of the claim or claims challenged in the motion, the Court must apply the law to the facts and enter judgment accordingly. Fed. R. Civ. P. 56(c).

In this case, the Secretary of Transportation has submitted with his motion for summary judgment a separate statement of 93 allegedly material facts. These statements appear, from the face of the document, to be properly supported by record citations. In response to both the Secretary's motion and statement of material facts, Mr. O'Meara submitted a single document captioned, "Response to Defendant's Motion for Summary Judgment." In it, he requests that the Secretary's motion be denied:

1. For all the reasons stated in the plaintiff's request for a jury trial[;]
2. Because of all of the information contained in the 142 exhibits that [have] been provided to the defendant[;] and

3. For all the information provided during the approximately sixteen hours of plaintiff's deposition[.]

(Docket No. 15.) Because this submission so clearly failed to comply with the Local Rule, I ordered it stricken, informing Mr. O'Meara that the Secretary's properly supported statements of fact would be deemed admitted "in the absence of a timely filed opposition to the motion." (Order, Docket No. 16.) The Order clearly referred Mr. O'Meara to the Local Rule. As of the date the Order was entered and filed, four days remained for Mr. O'Meara to either comply with the Local Rule or request an extension of time in which to do so. Mr. O'Meara declined to pursue either course.

THE FACTS

Although Mr. O'Meara failed to qualify or deny any of the Secretary's statements of material fact or to contest any of the Secretary's legal arguments by way of memorandum, the Court is still required to review the statement of material facts to determine whether the record truly supports each individual statement and to consider whether the law, as applied to those facts, actually warrants an entry of judgment in favor of the Secretary. D. Me. Loc. R. 56(e); Lopez v. Corporacion Azucarera de Puerto Rico, 938 F.2d 1510, 1517 (1st Cir.1991) ("[B]efore granting an unopposed summary judgment motion, the court must inquire whether the moving party has met its burden to demonstrate undisputed facts entitling it to summary judgment as a matter of law.") (citations and internal quotation marks omitted); Winters v. FDIC, 812 F. Supp. 1, 2 (D. Me. 1992) ("It is well-established law in this district that Fed. R. Civ. P. 56 requires the Court to examine the merits of a motion for summary judgment even though a nonmoving party fails to object as required by [the] Local Rule[s]."). My review of the statement and the record materials cited therein reflects that the following factual statements should be credited.

Plaintiff Christopher O'Meara is currently 70 years old. (Def.'s Statement of Material Facts, Docket No. 14, ¶ 1.) In April of 1971, at 37 years of age, Mr. O'Meara started working for the Federal Aviation Administration (FAA) as a Navigation and Communications Aids Electronic Technician in Houlton, Maine. (Id., ¶ 2.) Roughly four years after starting with the FAA in Houlton, Mr. O'Meara transferred to Portland, Maine. (Id., ¶ 4.) Two years later, in 1977, the FAA added a layer of management to its New England Region. Mr. Mezzanotte became the Sector Field Office II Manager and Mr. O'Meara's first level supervisor. (Id., ¶ 5.) In 1980, Mr. Mezzanotte was involved in promoting Mr. O'Meara from the position of radar technician to that of Supervisory Electronics Technician Sector Field Unit Chief of the Radar/Data Unit in Portland. (Id., ¶ 6.) As of the date of that promotion, Mr. O'Meara was 47 years old. (Id., ¶ 7.) In his new supervisory position, Mr. O'Meara engaged in significantly less physical activity on the job. (Id., ¶ 8.) In 1981, Mr. Mezzanotte evaluated Mr. O'Meara's performance in his new position as "outstanding." (Id., ¶ 10.) In May 1984, when Mr. O'Meara was 49 years old, Mr. Mezzanotte was involved in temporarily promoting Mr. O'Meara to a position that increased his pay grade from 13 to 14. (Id., ¶¶ 12, 13.) In the FAA, employees are occasionally promoted or detailed on a temporary basis to positions of greater responsibility, which promotions are generally considered advantageous when the employee later applies for a permanent promotion. (Id., ¶ 9.)

On July 16, 1987, Mr. O'Meara broke his right leg and right elbow in a bicycling accident. (Id., ¶ 16.) As a result of this accident, Mr. O'Meara's range of motion in his right elbow is limited. He is unable to safely ride a road bike, to play and coach baseball, to split wood and to cross country ski. He also swims less frequently than he did before the accident and

only in indoor pools; he considers it unsafe to hazard swimming in the ocean.[1] Finally, Mr. O'Meara experiences pain and discomfort if he has to drive for longer than one hour, although this difficulty is ameliorated by driving cars equipped with cruise control. (Id., ¶ 17.)

Following his injury, Mr. O'Meara was given a temporary promotion to Assistant Sector Manager by Mr. Mezzanotte and Robert Conrad, the Sector Manager. This promotion occurred in May 1989, when Mr. O'Meara was 55 years old. (Id., ¶¶ 19, 20.) In the following year, the FAA appointed Mr. O'Meara to serve as an Equal Employment Opportunity Investigator and provided him with training to perform in that position. (Id., ¶ 22.)

In his role as Supervisory Electronics Technician Sector Field Unit Chief of the Radar/Data Unit in Portland, Mr. O'Meara was expected to attend monthly meetings in Bangor along with other supervisors of his rank and up. (Id., ¶ 24.) For more than a year, Mr. O'Meara would car pool to these meetings with other supervisors in a government vehicle. However, when, on occasion, others were unavailable to car pool, Mr. O'Meara would drive himself to Bangor, which caused him some level of pain and discomfort. (Id., ¶ 25.) In a memorandum dated July 17, 1991, Mr. O'Meara informed his supervisor, Mr. Mezzanotte, that his physical condition did not permit him to continue driving to Bangor because extended driving caused him to experience muscle spasms, cramps, stiffness, pain and a difficulty in walking. (Id., ¶ 26.) Thereafter, Mr. O'Meara stopped attending monthly supervisor meetings in Bangor. (Id., ¶ 27.)

In August 1992, Mr. Mezzanotte completed a performance appraisal of Mr. O'Meara for the 1991-1992 period and assessed Mr. O'Meara's performance for that period as "proficient." Mr. O'Meara filed a grievance concerning this evaluation and Mr. Mezzanotte and Mr. Conrad

[1] The Secretary's description of Mr. O'Meara's physical limitations appears rather generous. In his deposition testimony, Mr. O'Meara states that he could still coach baseball, though less effectively, that he can ride a stationary bicycle, but will not risk riding a road bicycle again. (Dep. of Christopher O'Meara, Ex. 2, attached to Def.'s Statement of Material Facts, pp. 149-50.)

later upgraded the evaluation to "meritorious." (Id., ¶¶ 28, 29.) The grievance form did not set forth any allegations of discriminatory conduct on the part of Mr. O'Meara's supervisors, but rather questioned Mr. Mezzanotte's adherence to appraisal standards. (Id., Ex. 13.)

In October 1992, the Airways Facilities Division was reorganized. As a result, the Portland Radar Unit was placed under the supervision of Michael Lauer, who was located in Portsmouth, New Hampshire. Mr. Lauer became and remained Mr. O'Meara's first level supervisor until another reorganization in 1995. (Id., ¶ 31.) Mr. Lauer thereafter instructed Mr. O'Meara to start attending the monthly supervisor meetings in Bangor again. (Id., ¶ 33.) Mr. O'Meara objected based on his physical limitations and suggested that he travel to the meetings in his personal vehicle, which was equipped with cruise control. (Id., ¶ 34.) This suggestion was rejected, but for several months thereafter, Mr. Lauer, with the approval of Mr. Conrad, arranged for Mr. O'Meara and other supervisors to be flown to the Bangor meetings. (Id., ¶¶ 35, 36.)

In May 1993, Mr. Conrad, as part of a realignment of positions, assigned to Mr. O'Meara the responsibility for supervising the radar installation located in Manchester, New Hampshire, in addition to Portland, which would have required Mr. O'Meara to be in Manchester three days per week. (Id., ¶ 38.) Mr. O'Meara objected to this realignment of his duties because of the difficulty he would experience traveling to and from Manchester by car. (Id., ¶ 39.) Mr. O'Meara submitted a letter from his doctor, which letter indicated that Mr. O'Meara should refrain from driving as much as possible. Mr. O'Meara also submitted a "Self Identification of Medical Disability" form, in which he identified himself as being disabled due to limitations in his right arm and leg. (Id., ¶¶ 40-41.) Thereafter, Mr. Lauer assigned another individual to take responsibility for the Manchester radar installation. Mr. O'Meara's assignment was cancelled in

time so that he never was required to drive to Manchester to carry out supervisory duties. (Id., ¶ 42.)

Subsequently, Mr. O'Meara requested leave for two consecutive days in June 1993. Mr. Lauer denied the request based on the fact that those dates coincided with certain organizational meetings. (Id., ¶¶ 43, 44.) Thereafter, Mr. O'Meara and Mr. Lauer discussed the matter and Mr. Lauer agreed that Mr. O'Meara could take leave for the second day, but not the first. (Id., ¶ 47.)

In July 1993, Mr. Lauer signed a performance appraisal form concerning Mr. O'Meara's workplace performance for the period from August 1992 through July 1993. In it, he assessed Mr. O'Meara's performance as "proficient." Mr. O'Meara objected to the appraisal and filed a grievance on August 24, 1993. (Id., ¶¶ 48-49.) Nowhere in his grievance did he contend that his "proficient" appraisal was motivated by animus toward his physical limitations or age. (Id., ¶¶ 50-51, Ex. 22.) A grievance examiner reviewed the matter, sustained Mr. O'Meara's grievance and upgraded Mr. O'Meara's 1992-93 appraisal from proficient to "meritorious." (Id., ¶ 52.)

In the spring of 1994, Mr. Lauer directed Mr. O'Meara to downgrade an evaluation of one of Mr. O'Meara's subordinates from "outstanding" to "exceptional." (Id., ¶ 53.) Mr. O'Meara refused to do so and it appears that nothing ever became of the matter. (Id., ¶ 55.) In June 1994, Mr. O'Meara requested annual leave for four consecutive days in each of the following months: June, August, September and October. Mr. Lauer approved the requests for June and August, but disapproved the requests for September and October. Mr. Lauer indicated that the requested dates conflicted with scheduled organizational meetings and requested that Mr. O'Meara "please reschedule." (Id., ¶¶ 57-59.) Mr. O'Meara objected to the disapprovals and after conferring with Mr. Lauer, his October request was approved. (Id., ¶ 61.) The September request appears to have been disapproved over Mr. O'Meara's objection.

On June 14, 1994, Mr. O'Meara made his first contact with an EEO counselor about perceived discrimination in his employment. (Id., ¶ 62 & Exs. 30, 31.) The allegations he presented to the counselor concerned discrimination with regard to promotions and training assignments and a generalized "hostile work environment." (Id., Ex. 31.) On September 1, 1994, Mr. O'Meara filed his first administrative complaint alleging that he had been a victim of age and handicap[2] discrimination. (Id., ¶ 68, Ex. 34.) Most recent among his numerous allegations of discrimination was the denial of his annual leave request for July 1994. Most remote among them was the 1991-1992 performance appraisal. In addition to these allegations, Mr. O'Meara alleged that he had been denied "equal access" to Mr. Conrad, the Sector Manager, and that he had been subjected to a hostile work environment throughout the preceding seven years. (Id., ¶ 68, Ex. 34.)

In October 1994, Mr. Conrad temporarily promoted Mr. O'Meara to the position of Assistant Sector Manager. (Id., ¶ 69.) Though initially satisfied with the promotion, Mr. O'Meara requested that he be released from it in November 1994 based on a perception that a subordinate failed to show him sufficient regard in the presence of Mr. Conrad. (Id., ¶¶ 70, 71.)

In 1995, the FAA underwent a nation-wide realignment in order to downsize and save money. (Id., ¶ 73.) As a result of the realignment, Mr. O'Meara's supervisory duties were modified. According to Mr. O'Meara, a significant reduction in force resulted in he and other supervisors being formally assigned supervisory responsibility over certain aspects of FAA operations without having any real supervisory authority. (Id., ¶ 74.) On July 11, 1995, Mr. O'Meara contacted an EEO counselor about an allegedly discriminatory "event" that had occurred on July 7, 1995. That event was a memorandum from a superior describing who would

[2] So-stated on the EEOC form.

be responsible for supervising certain environmental technicians. That issue had been the subject of a disagreement between Mr. O'Meara and his supervisors since 1992. (Id., ¶ 75.)[3]

On August 15, 1995, Mr. O'Meara filed his second administrative complaint of age and handicap discrimination in which he complained of a June 23, 1995 memorandum, a May 3, 1995 document concerning the 1995 realignment, defacing of an office bulletin board from January 1995 through April 1995, an allegation by Mr. Conrad that Mr. O'Meara had engaged in misconduct, and a 1992 memorandum that informed Mr. O'Meara that he would no longer have supervisory authority over certain environmental technicians. (Id., ¶ 76, Ex. 40.)

In September 1995, Mr. Mezzanotte temporarily promoted a 40 year-old Dale Robinson to serve as Sector Field Office Manager in Portland while Mr. Mezzanotte was away from the office. (Id., ¶¶ 77-78.) On November 1, 1995, Mr. O'Meara made initial contact with an EEO counselor and complained that he was denied this same temporary promotion based on age discrimination. (Id., ¶ 84.) According to Mr. Mezzanotte, he did not select Mr. O'Meara for this temporary promotion because Mr. Mezzanotte believed that it was important for Mr. O'Meara to be available to oversee the final stages of the commissioning, inspection and acceptance of a new radar facility in Cumberland, Maine, which was finally commissioned on or about September 28 or 29, 1995. (Id., ¶¶ 79-82.) Indeed, on October 1, 1995, Mr. O'Meara declined to lend manpower from his radar unit to help remove the old radar installation in Portland because his "first priority" was to work on problems with the new Cumberland facility and because it "would be irresponsible to divert the limited manpower resource of the Radar/Data Unit to any other

[3] It appears that Mr. O'Meara was relieved of supervisory authority over these technicians in 1992, had objected to that event, but his objections had never been addressed by his supervisors. When the 1995 reorganization appeared, at least on paper, to reassign him supervisory authority over these technicians, Mr. O'Meara evidently found it an appropriate time to re-air his objection to the 1992 "event." (Id., ¶¶ 74-75 and sources cited therein.) The Secretary's explanation of these events is not easy to follow and many of the statements of fact are supported only by citation to hearsay sources. Nevertheless, Mr. O'Meara has failed to object to any of these statements.

tasks." (Id., ¶ 83.) Moreover, in August 1994, Mr. O'Meara had declined a temporary, but career advancing, detail in Washington, D.C., on the ground that it would have been "irresponsible" for him to be away from his duties as Supervisor of the Radar Unit because of "intense" planning and implementation for the planned Cumberland radar facility. (Id., ¶¶ 63-67.)

On November 22, 1995, Mr. O'Meara filed his third administrative complaint of discrimination, alleging age and disability discrimination as well as retaliation for prior EEOC activity, which allegedly manifested itself in his (1) not receiving the temporary promotion in September 1995, (2) not being informed of an October 1995 change in standard operating procedure and (3) being subjected to a hostile work environment since August 28, 1992. (Id., ¶ 85; see also Docket No. 14, Ex. 48.) Mr. O'Meara retired from the FAA on January 3, 1996, at the age of 62. (Id., ¶ 86.) The FAA issued its final agency determination on his administrative complaints on June 28, 2000. It denied all of Mr. O'Meara's pending claims. (Id., ¶ 90.) Mr. O'Meara timely appealed the determination to the Equal Employment Opportunity Commission, which denied his appeal following its review. (Id., ¶¶ 91-92.)

In his complaint filed October 25, 2002, Mr. O'Meara asserts three counts: (1) a claim of age discrimination brought under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634; (2) a claim of disability discrimination brought under the Rehabilitation Act, 29 U.S.C. §§ 791-796*l*; and (3) a claim of retaliation for administrative activity with the Equal Employment Opportunity Commission, Subchapter VI of the Civil Rights Act, 29 U.S.C. § 2000e-3. In his demand for relief, he requests: (1) "lost wages and employment benefits that he would have earned by continuing as a GS-1201-13 until age 65"; (2) "lost income from social security benefits that would have begun at age 65 rather than 62; (3) "lost wages and employment

benefits that he would have earned with temporary promotions that would have impacted his retirement annuity"; and (4) such other and further relief as the court deems necessary and in the public interest." (Complaint and Demand for Jury Trial, Docket No. 2.)

DISCUSSION

Not only has Mr. O'Meara failed to contest or expand upon the Secretary's factual presentation, but he has also failed to articulate how the facts might support his claims. Nevertheless, it is appropriate for the Court to address the merits of the summary judgment motion. See Redman v. Federal Deposit Ins. Corp., 794 F. Supp. 20, 21-22 (D. Me. 1992).

A. Age Discrimination

Pursuant to the Age Discrimination in Employment Act (ADEA), a federal agency may not discriminate against its employees on account of age with respect to "personnel actions." 29 U.S.C. § 633(a). There being no direct evidence of age discrimination in these facts, Mr. O'Meara's age discrimination claim must be evaluated under "the familiar burden-sharing paradigm established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1995)." Gonzalez v. El Dia, Inc., 304 F.3d 63, 68 (1st Cir. 2002). This paradigm imposes the first burden of production on Mr. O'Meara, who must demonstrate the following four things: (1) that he was at least forty years of age; (2) that his job performance met the FAA's legitimate expectations; (3) that the FAA subjected him to an adverse employment action; and (4) that age was a factor in the adverse employment action (e.g., younger individuals were not subjected to the adverse employment action based on otherwise similar incidents). Id.; Ruiz v. Posadas De San Juan Assocs., 124 F.3d 243, 247-48 (1st Cir. 1997).

The only adverse employment action that Mr. O'Meara points to under his age discrimination count is the denial of a temporary promotion in 1995 while he was actively

supervising the installation of the new radar facility in Cumberland.[4] The record reflects that temporary promotions of the kind at issue involve pay increases and can help to advance an employee's career. Thus, the denial of a promotion would amount to an adverse employment action. Moreover, the individual who received the promotion in Mr. O'Meara's stead was younger than he. As a consequence, a "rebuttable presumption" arises that Mr. O'Meara was subjected to age discrimination in employment. El Dia, Inc., 304 F.3d at 68-69. However, this simply creates a burden of production for the Secretary to show that the denial of the promotion was based on legitimate, non-discriminatory factors. Id. at 69; St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993). This burden has been carried by the Secretary, who has produced evidence showing that Mr. O'Meara did not receive the promotion at issue because at that time his supervision was needed at the new radar installation in Cumberland. Thus, the presumption of discrimination that arose from the prima facie showing is rebutted and Mr. O'Meara must present evidence tending to show that the Secretary's explanation is a pretext, from which a factfinder might infer discriminatory animus. El Dia, Inc., 304 F.3d at 69. This he thoroughly fails to do, having made no factual presentation whatsoever and having failed to articulate any

[4] The Secretary discusses all of Mr. O'Meara's alleged workplace indignities on an equal footing. That extended list includes the following: (1) the 1991-92 "proficient" performance appraisal that was upgraded to "meritorious" by the FAA in the context of informal grievance procedures; (2) the 1992-93 "proficient" performance appraisal that was upgraded to "meritorious" by the FAA in the context of informal grievance procedures; (3) the denial of annual leave requests because the dates requested conflicted with organizational meetings, most of which were subsequently approved following Mr. O'Meara's objections; and (4) the alleged lack of equal access to his Sector Manager. Of these several events, not one is sufficient to support a prima facie case. The first and second events are not actionable because the FAA upgraded the appraisals in exactly the manner that Mr. O'Meara requested. Thus, the FAA did not impose any adverse personnel action on him with respect to the annual appraisals or cash bonuses connected thereto. The third event is not actionable because the denial of a few days of annual leave due to a scheduling conflict is not an adverse personnel action and, in any event, there is no evidence that Mr. O'Meara's supervisor treated leave requests by similarly situated, younger employees any differently. The fourth event is not actionable because the only evidence introduced in the summary judgment statement of unequal access to the Sector Manager is Mr. O'Meara's own conclusory statement to that effect. There is no particularized factual context in the statement of material fact from which the Court might assess the significance of the alleged denial of access. Furthermore, it appears that Mr. O'Meara's deposition testimony is to the effect that he and Mr. Conrad had a personality conflict and that Mr. O'Meara's lack of access to Mr. Conrad was a consequence of that poor relationship, not Mr. O'Meara's age. (Def.'s Mot. for Summ. J. Incorporating a Mem. of Points and Authorities, Docket No. 13, at 8 n.4.)

rationale for attributing pretext to the Secretary's perfectly plausible, non-discriminatory explanation. I therefore recommend that the Court grant summary judgment in favor of the Secretary on Count I.

B. Disability Discrimination

Pursuant to the Rehabilitation Act, a federal agency may not discriminate in employment against an "otherwise qualified individual with a disability." 29 U.S.C. § 794(a), (b). Cases asserting disability discrimination under the Rehabilitation Act are evaluated under the same standards as disability cases pursued under the Americans with Disabilities Act. Id., § 794(d); EEOC v. Amego, Inc., 110 F.3d 135, 143 (1st Cir. 1997). Accordingly, where a plaintiff alleging employment discrimination seeks to overcome a summary judgment motion based on circumstantial evidence, he must comply with the McDonnell-Douglas burden-sharing paradigm already discussed, supra.

Mr. O'Meara's evidence of disability discrimination is not easy to discern. In his complaint, he alleges that his supervisors continued to assign him duties "which would have compounded Mr. O'Meara's [impairment-related] difficulties." (Complaint, Docket No. 2, ¶¶ 32, 34.) According to Mr. O'Meara, these assignments were made with the purpose of forcing him to retire. (Id., ¶ 35.) However, one is at a loss to identify any adverse personnel action when one looks to the facts concerning Mr. O'Meara's driving limitations. The facts pertaining to both his attendance at organizational meetings and his ability to carry out supervisory duties in Manchester reflect that Mr. O'Meara's supervisors made timely arrangements in light of Mr. O'Meara's concern that he not be forced to drive more than an hour in a car without cruise control. With regard to the Bangor meetings, Mr. O'Meara primarily rode as a passenger in a carpool and, after it became necessary for him to drive himself on a more regular basis, he

provided his supervisor with written notice that doing so was causing him physical pain due to his physical impairment. Thereafter, it appears that Mr. O'Meara was cleared to stop attending the meetings until such time as the Airways Facilities Division reorganized in 1992, at which point he was required by a new supervisor to attend the Bangor meetings, but was transported to the meetings in an airplane. The issue of attendance at the Bangor meetings does not appear to have resurfaced again. With respect to driving to Manchester, Mr. O'Meara was relieved of that assignment without ever having to drive himself there for that purpose. Thus, by all appearances, Mr. O'Meara's supervisors were all responsive to his requests that he not be required to attend meetings in Bangor to which he would have to drive himself and that he not be required to assume supervisory responsibilities in Manchester because of his driving limitations. Thus, even if the Court were to characterize Mr. O'Meara as disabled for purposes of the Rehabilitation Act, which would not be warranted, see 29 U.S.C. § 705(20)(B) (defining individual with a disability to be one who is substantially limited in a major life activity); Toyota Motor Mfg. v. Williams, 534 U.S. 184, 196-197 (2002) (discussing what it means for an impairment to "substantially limit" a "major life activity" and holding that an impairment must prevent or severely restrict an individual from doing activities of "central importance to most people's daily lives"), there is neither evidence of any adverse employment action being visited upon him as a consequence of his disability nor evidence of more favorable treatment being extended to non-impaired employees. I therefore recommend that the Court grant summary judgment in favor of the Secretary on Count II.

C. Retaliation for Pursuing Age- and Disability-Discrimination Charges

In his final count, Mr. O'Meara alleges that the Secretary discriminated against him in retaliation for pursuing administrative complaints with the Equal Employment Opportunity

Commission (EEOC). He contends that this was a violation of the "Equal Employment Opportunities Act," or Subchapter VI of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17, which protects employees and applicants for employment from discrimination on the basis of race, color, religion, sex, or national origin (not age or disability) and from retaliation for filing charges of such discrimination. 42 U.S.C. §§ 2000e-2 & 2000e-3. These protections extend to certain federal employees, including employees of executive agencies. 42 U.S.C. 2000e-16(a). However, these protections concern exclusively, race, color, religion, sex and national origin and, therefore, have nothing to do with this case because the charges Mr. O'Meara brought to the EEOC were based on alleged age and disability discrimination, not any of the subchapter VI categories. In other words, if a retaliation claim can be made out by a federal employee based on age or disability proceedings, such a claim would not arise under § 2000e-3, as Mr. O'Meara appears to suggest. See Lennon v. Rubin, 166 F.3d 6, 8 (1st Cir. 1999) ("[S]ince Lennon's previous complaints related to age rather than to a category protected under Title VII, his retaliation claims are not cognizable under Title VII."). Because this issue concerns the Court's subject matter jurisdiction, it deserves to be resolved before addressing the merits of Mr. O'Meara's retaliation claim. I do so sua sponte in light of the Secretary's failure to brief the issue. Although Mr. O'Meara's age and disability retaliation claim is not made actionable by Title VII, the age discrimination component is authorized by § 633a of the ADEA and the disability discrimination component is authorized by § 794 of the Rehabilitation Act. See 29 U.S.C. § 633a (prohibiting "any discrimination based on age")[5] (emphasis added); 29

[5] See also Forman v. Small, 271 F.3d 285, 295-96 (D.C. Cir. 2001) (discussing distinction between the anti-discrimination provision applicable to the federal sector (§ 633a) and that applicable to the state and private sectors (§ 623) with respect to claims of retaliation but concluding that the "sweeping" language of § 633a is sufficiently broad to prohibit retaliation for filing an age claim). As observed by the Forman Court, "It is difficult to imagine how a workplace could be 'free from *any* discrimination based on age" if, in response to an age discrimination claim, a federal employer could fire or take other action . . . adverse to an employee." Forman, 271 F.3d at 297.

U.S.C. § 794(a), (d) (incorporating 42 U.S.C. § 12203, which prohibits discrimination "against any individual because such individual has opposed any act or practice made unlawful . . . or [has] made a charge . . . or participated in any manner in an investigation, proceeding, or hearing . . . ."). With that preliminary concern settled, I turn to the merits of Mr. O'Meara's retaliation claim.

An employee's "retaliation claim may be viable even if the underlying discrimination claim is not." Benoit v. Tech. Mfg. Corp., 331 F.3d 166, 174 (1st Cir. 2003). To establish a prima facie case of unlawful retaliation, Mr. O'Meara must demonstrate that "(1) he engaged in protected activity; (2) he suffered an adverse employment action after or contemporaneous with such activity; and (3) there existed a causal link between the protected activity and the adverse job action." Id. at 175 (addressing a retaliation claim brought pursuant to 42 U.S.C. § 2000e-3). Mr. O'Meara's first EEOC activity occurred in June of 1994. Subsequent to that date, Mr. O'Meara complained of the following workplace events:

(1) The 1995 nation-wide realignment that lead to a modification of Mr. O'Meara's supervisory duties (and the supervisory duties of other individuals at the FAA);

(2) The defacement of an office bulletin board from January 1995 through April 1995;

(3) A 1995 allegation by Mr. Conrad that Mr. O'Meara had engaged in certain misconduct;

(4) The temporary promotion in the fall of 1995 of Dale Robinson instead of Mr. O'Meara to serve as Sector Field Office Manager in Portland;

(5) The failure to inform him of an October 1995 change in standard operating procedure; and

(6) An allegedly on-going, hostile work environment.

As already discussed, none of these events other than the fourth could be actionable because none presents an adverse employment action. Finally, as to every event, including the fourth, there is nothing in the summary judgment record to support a finding that such event was meted out on Mr. O'Meara because of his EEOC activity (e.g., evidence that individuals outside the age or disability category were treated differently). I therefore recommend that the Court grant summary judgment in favor of the Secretary on Count III.

Hostile Work Environment/Constructive Discharge

Though not formally denominated as a count, Mr. O'Meara alleges that he was forced to retire early because he was "unable to continue in the face of the discrimination and hostile work environment." (Complaint, Docket No. 2, ¶ 22.) The hostile work environment theory is premised on the notion that a pattern of discriminatory events of "intimidation, ridicule, and insult" may rise to the level of an adverse employment action if that pattern of conduct is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," even though none of the individual events would rise to the level of an adverse employment action standing alone. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 78, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998) (internal quotation marks and citation omitted). Thus, the pattern of conduct complained of must be (1) characterized by intimidation, ridicule and insult, not just minor unpleasantness or criticism, (2) offensive to the complainant precisely because of his or her membership in a protected class, and (3) sufficiently burdensome to materially alter the conditions of the complainant's employment. Id.; White v. New Hampshire Dep't of Corrections, 221 F.3d 254, 259-60 (1st Cir. 2000). Because no pattern of intimidation, ridicule or insult is apparent in this record, I recommend that summary judgment enter on behalf of the Secretary on this unenumerated count. Finally, because a constructive

discharge theory concerns damages rather than liability, i.e., the availability of post-retirement economic losses, Marrero v. Goya of P.R., Inc., 304 F.3d 7, 28 (1st Cir. 2002), it is not material to the claim-dispositive arguments raised by the Secretary. In any event, Mr. O'Meara would have to present evidence that his "working conditions were so unpleasant that staying on the job while seeking redress would have been intolerable," id., something that is wholly missing as a consequence of Mr. O'Meara's refusal to develop the summary judgment record.

Conclusion

For the reasons stated herein, I recommend that the Court GRANT summary judgment in favor of the Secretary on all counts of the Complaint.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection. Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

October 2, 2003

/s/ Margaret J. Kravchuk
United States Magistrate Judge

OMEARA v. TRANSPORTATION, US
Assigned to: JUDGE D. BROCK HORNBY
Referred to:
Demand: $0
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 42:2000 Job Discrimination (Age)

Date Filed: 10/25/02
Jury Demand: Plaintiff
Nature of Suit: 442 Civil Rights: Jobs
Jurisdiction: Federal Question

Plaintiff

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V.

Defendant

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